

Attachment 11

Testimony at ABA Hearing on the Right to
Counsel 40 Years After Gideon v. Wainwright,
Seattle, Washington, November 13, 2003

23 It's my privilege next to call William J. Leahy,
24 chief counsel for the Committee for Public Counsel Services,
25 Boston, Massachusetts, who will have ten minutes.

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1 MR. LEAHY: Thank you. I think it's interesting
2 that you have my testimony following Jonathan's because I've
3 got structure and he or at least the State of New York in
4 its disorganization seems to have some of the money that we
5 don't have in Massachusetts.

6 In Massachusetts since 1984 we have had exactly or
7 at least similarly the kind of independent statewide
8 organization that Jonathan has just suggested is desirable
9 for New York, and it is desirable in many ways.

10 If I could, I gave to the panel this morning a
11 series of public documents. I would like to quote an
12 excerpt from the remarks I gave on the Gideon 40th
13 Anniversary at the Statehouse in Boston, Massachusetts, in
14 which I said to the panel members -- this will be some of
15 the second paragraph of my remarks -- the right to counsel
16 in Massachusetts is today in excellent condition in every
17 respect but one. We have a capable and public spirited
18 cadre of attorneys who represent the public service. We
19 have an agency which takes seriously its responsibility to
20 provide high quality representation. We have training
21 expectations and performance standards which meet or exceed
22 every comparison. We simply do not have enough money or, to
23 be precise, we have not received sufficient funding to pay a
24 reasonable hourly rate to assigned private counsel or
25 reasonable salaries to our staff attorneys.

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1 When you go over the ABA Ten Principles and you
2 relate them to how our organization is designed to operate
3 and largely does operate, on the surface it certainly looks
4 as though we've got all the problems licked in
5 Massachusetts. We've got the independence. We've got the
6 standards. We've got the oversight of the private bar.
7 We've got the case load limitations. We've got the access
8 to support services. We have everything you could wish for,
9 but we also have an enormous breadth of responsibility as I
10 indicated in my court written summary.

11 We have very extensive misdemeanor representation
12 responsibilities which we have attempted largely
13 unsuccessfully to have the State treat as civil infractions
14 rather than criminal offenses with all the consequences of
15 criminal offenses and the cost of the criminal
16 representation.

17 We also have very extensive civil case
18 responsibilities in Massachusetts. There is entitlement for
19 both parents and children in the care and protection cases
20 in which Massachusetts is extremely active, and therefore
21 the cases are extremely numerous.

22 We have extensive responsibility in the mental
23 health area civil commitment work which is fairly
24 traditional but also almost a \$2 million a year
25 responsibility in what we call Rogers cases in

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1 Massachusetts, which are persons who are not competent or
2 considered not competent to be medicated and they have a
3 right to counsel in those cases; also in the now
4 increasingly popular sex offender registry which comes in in
5 Massachusetts loaded with right to counsel at every stage of
6 the proceedings; and the now becoming more popular and
7 slated to become much more popular in the future, if media
8 pressure is any guide, the commitments of allegedly sexually
9 dangerous persons following the completion of their
10 incarceration for the offense.

11 All of these responsibilities are expensive for
12 us, and what we're seeing in Massachusetts is a fiscal
13 squeeze in which doing those cases and doing them right and
14 doing them at a reasonable cost puts us into competition
15 every year in the budget process with funding initiatives
16 which are worlds more popular: doing something about
17 education reform, trying to keep up with Medicaid costs,
18 trying to do something for the elderly, the young, the
19 disabled, the retarded. And despite our extensive
20 responsibilities of course in the civil area, we're still
21 primarily politically seen and our major cost center still
22 is criminal defense; and criminal defense will never be a
23 popular political item.

24 Since I gave that talk on the 40th Anniversary and
25 we received a lovely plaque from the State legislature

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1 extolling our virtues and saying how appreciated we were and
2 how necessary we were, we had in the summer a fairly well
3 publicized crisis in which the legislature recessed for the
4 summer without having taken action on the end of the fiscal
5 year -- that's June 30 in Massachusetts -- deficiency. We
6 tend to receive a deficiency appropriation around the end of
7 each fiscal year as the final bills come clear and the
8 attorneys are paid, the private attorneys, and the
9 legislature recessed and that wasn't done.

10 And some of the materials you have relate to a
11 gathering storm that started in southeastern Massachusetts
12 and spread to the western part of the State; and if you know
13 Massachusetts at all, you'll not be surprised to know that
14 really nothing happened until it had hit Boston and then
15 suddenly became front page news and it was a crisis. Hadn't
16 been a crisis when it was rolling through the rest of the
17 State. So eventually in mid-August that appropriation was
18 taken care of but at some cost because there were shots from
19 the governor, Governor Romney, that this was a threat to
20 public safety.

21 And there were not necessarily in the public press
22 but behind-the-scenes suggestions that if the lawyers knew
23 what was good for them they would get back to work and if
24 the agency that funded them and oversaw them knew what was
25 good for it it would get them back to work. And there was

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1 comparisons to the 1919 Boston police strike that propelled
2 the then Governor Calvin Coolidge -- in the view of some; in
3 view of many I guess -- to the presidency, and at the same
4 time the governor having recommended the approval for the
5 payment of the bills in full for the last fiscal year he

6 promptly vetoed in almost the same breath \$13 million from
7 the \$72 million that had been appropriated for private
8 counsel funding in the current fiscal year.

9 That is a veto which the Massachusetts legislature
10 has six days from now to override and we're assured they
11 will override, but it hasn't happened yet. And if they
12 don't override it, then the lawyers who provide the services
13 will know that their fears will come true, that in fact
14 there will come a day next spring or summer when their
15 income takes a temporary halt for an unknown period of time
16 because the State hasn't seen fit to fully fund the account.

17 Also, on the staff side -- and this relates to the
18 one structural deficit. And if New York is luckily enough
19 to get its independent commission, I think the principal
20 lesson you can take from Massachusetts is you have to create
21 a truly mixed system of assigned counsel. You cannot have,
22 as Massachusetts has in many of its areas, almost complete
23 reliance on private counsel. We do I think an excellent job
24 in overseeing private counsel; but except in the felony
25 defense area, we either have no staff presence or we have

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1 very limited staff presence in terms of direct
2 representation. We have almost none in the juvenile
3 delinquency area. We have one great project that only
4 covers the Roxbury section of Boston. We have two staff
5 projects on the Children and Family Law in Salem and
6 Springfield but not in the rest of the state. We have a
7 tiny mental health staff that oversees private counsel
8 representation rather than provides directly itself, and we
9 need a staff component and are pushing. And we proceed by
10 inches where we need to proceed by big steps in terms of
11 achieving some balance in the delivery of services outside
12 the felony defense area.

13 CHAIRMAN ROSS: Mr. Leahy, thank you very much.
14 Coming from North Hampton, Massachusetts, I've never heard
15 of Boston; but I'm glad to know it's so influential.

16 Ms. Jones.

17 MS. JONES: Yes. I have one question for you
18 about case loads. Usually the problem that arises when
19 funding is limited is very high case loads and a compromise
20 in the quality of representation. Has that been a problem?
21 Or what has been done to combat that?

22 MR. LEAHY: Actually we have a lot of controls in
23 place in both the public and private side. On the public
24 side we strictly limit our case loads; and the minute that
25 our case load limits are reached, we stop and it goes to the

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1 private bar. In the private bar when we have had enough
2 attorneys it also hasn't been a problem. We have
3 limitations for the private bar, and we have a billing cap
4 of 1,800 hours that is inflexible. Nobody can bill more
5 than 1,800 hours on cases.

6 The problem is that in the past three or four
7 years of budget restrictions and a stagnant hourly rate we
8 have lost several hundred of our assigned private counsel,
9 over 10 percent of our total number; and because of budget
10 cuts in our staffing area, we've lost about 10 percent of

11 our public defender staff as well so that it's not the
12 absence of case load limits but the combination of case load
13 limits and low funding which is now leading to a counsel
14 crisis.

15 I left a copy with your staff person of the recent
16 October 20 Spangenberg report on the crisis in western
17 Massachusetts in the Children and Family Law area which is
18 where it really is in fact an immediate crisis right now.

19 MS. JONES: Thank you.

20 MR. LEAHY: So standards are wonderful but don't
21 replace funding.

22 CHAIRMAN ROSS: Mr. Leahy, thank you very much for
23 coming out here and speaking with us.